IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9212 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE K.G.BALAKRISHNAN and

MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

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2. To be referred to the Reporter or not? Yes--but only ( ) portion i.e. paras 7-8.

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

No

5. Whether it is to be circulated to the Civil Judge?

No

NATWARLAL B PATEL

Versus

STATE OF GUJARAT .

Appearance:

MS KJ BRAHMBHATT for Petitioners

Mr.U.A.Trivedi, ld.Asst.GP for Respondent No. 1

MR DJ BHATT for Respondent No. 10

CORAM : MR.JUSTICE K.G.BALAKRISHNAN and

MR.JUSTICE J.M.PANCHAL

Date of decision: 17/03/98

ORAL JUDGEMENT (Per J.M.Pachal,J.)

By means of filing this petition under Articles 226/227 of the Constitution of India, the petitioners have prayed to issue a writ of certiorari or any other apporpirate writ ,order or direction to quash and set aside the order dated June 1, 1993 passed by the State of Gujarat, by which, order dated August 2, 1991 passed by the Deputy Collector (NA), Ahmedabd, determining new assessment and conversion tax payable by the petitoiners and imposing penalty for using land in question for non agricultural purpose without permission of the Collector as well as order dated May 15, 1992 passed by respondent no.2 dismissing the appeal against order dated Augst 2, 1991, have been confirmed.

2. The petitioners are owners of agricultural land bearing survey no.158/1 admeasuring 5632 sq. mtrs. situated at village Baug-e-Firdos, District Ahmedabad. The petitioners had submitted a statement before the competent authority, as required by Section 6 of the Urban Land (Ceiling and Regulation) Act, 1976 wherein also survey no.158/1 was shown to be an agricultural land. The petitioners entered into an agreement to sell land bearing survey no.158/1 with respondents no.4 to 8 on January 31, 1979. The said agreement is produced by the petitioners at Annexure-A to the petition. It is the case of the petitioners that respondents no.4 to 10 unauthorisedly changed the user of the land and used it for non agricultural purpose. The non-agricultural use of the land in question was noticed by the Deputy Collector, Ahmedabad. He, therefore, issued notice calling upon the petitioners as well as respondents no.4 to 10 to show cause as to why penalty and other taxes leviable as contemplated by Sec.66 of the Bombay Land Revenue Code, 1869 should not be imposed. The petitioners gave reply to the said notice. After considering the relevant materials, respondent no.3 by order dated August 2, 1991 held that the petitioners were also liable for non agricultural use of the land in question. The Deputy Collector,Ahmedabad, therefore, directed that the petitioners as well as respondents no.4 to 10 were liable to pay Rs.25,744/-towards new assessment charges, Rs.12,872/- as penalty and Rs.5362/-as conversion tax. A direction was also given to the occupants to remove the unauthorised construction. A copy of the order dated August 2, 1991 passed by Deputy Col;lector, Ahmedabad is produced by the petitioners at Annexure C to the petition.

3. Feeling aggrieved by the said order, the petitioners preferred an appeal before respondent no.2 i.e. Collector, Ahmedabad. The Collector dismissed the

appeal by order dated May 15, 1992. The order passed by the Collector in appeal is produced by the petitioners at Annexure D to the petition.

4. Thereupon, the petitioners moved the State of Gujarat by way of fling a revision application. The State of Gujarat rejected the Revision Application filed by the petitioners by order dated June 1, 1993, which has given rise to the present petition. The order passed by the State Government in the Revision Application filed by the petitioners is produced at Annexure-A to the petition.

5. The learned Counsel for the petitoiners submitted that respondents no.4 to 8, who had no title to the land, had unauthorisedly used the land for non agricultural purpose and therefore, the petitioners could not have been held liable either to pay new N.A. assessment or to pay peanlty or to pay conversion tax and therefore, the impugned orders should be set aside. It was pleaded that though Survey No.158/1 totally admeasures 5632 sq. mtrs., only 2672 sq. mtrs. of land was put to non-agricultural use and therefore, the respondents were not entitled to levy N.A. assessment charges, penalty or conversion tax for the remaining area of the land and therefore, the petition deserves to be accepted. It was claimed that, though respondent no.3 has held that the petitioners are liable to pay an amount of Rs.25,744/- by way of new assessment, a mathematical error has been committed by respondent no.3 in computing the said assessment and therefore, the same should be rectified by the Court. In support of her submission, learned Counsel for the petitioners placed reliance on the decision rendered in Vasudev Sakarabhai Modi vs. Special Secretary Revenue Department reported in 26(1) GLR 33.

6. Mr.U.A.Trivedi, ld. Asst.Govt.Pleader submitted that in a case where the land is converted into non agricultural use without previous permission of the Collector, the Government is entitled not only to levy a fine but also to enhance the new assessment for the period during which the land was so used and therefore, the impugned order should not be interfered with by the Court. It was pleaded that the words "so used" in Sec.66 of the Bombay Land Revenue Code do not import user by any particular class of persons such as those mentioned in Sec.65 and an occupant of agricultural land is liable to fine under Sec.66 of the Code if there is any user of the land for non-agricultural purpose irrespective of whether the conversion has been made by the occupant or his tenants or agents or by some trespassers without the

occupant's knowlege or consent. The learned Assistant Govt. Pleader contended that, a just order has been passed by the Deputy Collector, which has been confirmed by the Collector and the State Government and therefore, the petition should be dismissed. In support of his submission learned Counsel for respondents nos.1 to 3 placed reliance on the decision rendered in the case of Secretary of State vs. Ganesh Narayan Gadgil reported in AIR 1937, Bombay 456.

(7. In view of the rival contentions advanced at the bar, the question which falls for the consideration of the Court is, whether the occupant is primarily liable for unauthorised use of the land by himself or by his tenant or the person holding under or through him. Sec.65 of the Bombay Land Revenue Code 1879 provides that an occupant of land assessed or held for the purpose of agriculture, is entitled by himself, his servants, tenants, agents or other legal representatives to erect farm buildings, construct wells or tanks, make any other improvements thereon for the better cultivation of the land or its more convenient use for the purpose aforesaid, but, if any occupant wishes to use the land or any part thereof for any other purpose, he has to obtain necessary permissoin from the Collector. Sec.66 of the Bombay Land Revenue Code makes provision for penalty for using land without permission of the Collector and it reads as under:

"If any such land be so used without the permision of the Collector being first obtained, or before lthe expiry of the period prescribed by sec.65, the occupant and any tenant or other person holding under or through him shall be liable to be summarily evicted by the Collector from the land so used and from the entire field or survey number of which it may form a part, and the occupant shall also be liable to pay, in addition to the new assessment which may be leviable under the provisions of Sec.48 for the period during which the said land has been so used such fine as the Collector may, subject to the general orders of the State Goverment, direct.

Any tenant of any occupant or any other person hlding under or thorugh an occupant, who hsall without the occupant's consent use any such land for any such purpose and thereby render the said occupant liable to the penalties aforesaid shall be responsible to the said occupant in damages."

A bare reading of Sec.66 makes it abundantly clear that, if any land referred to in Sec.65, is used for any purpose other than the purpose for which the said land is assessed, or held without the permission of the Collector being first obtained, then the occupant is liable to pay the new assessment leviable under Sec.48 as well as the converesion tax leviable under Sec.67A of the Code. Clause (a) of Sec.66 in terms lays down that the occupant and any tenant or other person holding under or through him shall be liable to be summarily evicted by the Collector from the land so used and from the entire survey number or sub-divison of the survey number of which it may form a part, whereas clause (b) of Sec.66 provides that the occupant shall also be liable to pay for the period during which the said land has been so used such fine as the Collector may direct. Therefore, Sec.66 not only makes servants, tenants, agents or other legal representatives of the occupant liable for payment of new assessment, conversion tax and penalty, but also makes the occupant liable to pay the new assessemnt levaible under Sec.48 as well as the conversion tax and penalty which may be determined by the Collector. The submission that respondents no.4 to 10, as trespassers, have unauthorisedly used the land for non agricultural purpose and therefore fine could not have been imposed on the petitioners as occupants of the land is devoid of merits. Admittedly, the petitioners have executed an agreement to sell the land in favourof the respondents and inducted them into possession of land. Though the respondents have not acquired title to the land, they cannot be treated as trespassers. In fact, respondents nos. 4 to 8 will have to be treated as persons holding the land under or through the petitioners. It is evident that the respondens no.4 to 8 permitted a co-operative society to be formed and respondent no.10 who is a builder has constructed residential units on the land for use by members of the society. Having regard to totality of the facts and circumstances of the case, it cannot be said that unauthorised use of the land is made by trespassers and therefore, the petitioners are not liable to pay fine. Even if it is held that unauthorised use of the land was made by the trespassers without consent and knowledge of the petitioners, the petitioners cannot avoid their liability to pay the fine. In Vasudev S. Modi vs. Special Secretary, Revenue Department(Supra), the learned Single Judge, on interpretation of Sec.66 has held that penalty cannot be imposed on the occupier for non agricultural use of land by tresspassers. In that case, the property belonging to the occupier was placed

under the management of the Receiver and thereafter, under the management of the Court Commissioner, but during such management, number of trespassers had entered into the land and put the land to non-agricultural use by constructing hutments thereon. The question considered by the learned Single Judge was, whether the occupier of the land was liable to pay penalty. On interpretation of Sec.66 of the Code, the learned Single Judge held that Section 66 nowhere creates any liability on the occupant for the act of trespasser and therefore, penalty cannot be imposed on the occupier for thesaid use by the trespasser. However, we find that the learned Single Judge, while delivering the judgment in the case of Vasudev S.Modi (Supra), had not noticed the judgment of the Division Bench of Bombay HighCourt rendered in case of Secretary of State vs. Ganesh Narayan Gadgil--AIR 1937 Bombay 456, wherein a contrary view has been expressed by the Division Bench of Bombay High Court. In the case of Secretary of State (Supra), the respondent was the occupant of certain land assessed for agricultural purpose. A trespasser had entered upon the land without the knowledge or consent of the occupant, and quarried stones from the land. Thus the land was used for a non-agricultural purpose by the trespasser. The question which was considered by the Division Bench of the Bombay High Court was, whether such use by a trespasser would subject the occupant to liability to a fine under Sec.66 of the Bombay Land Revenue Code. On consideration of the provisions of Sec.65 read with Sec.66 of the Bombay Land Revenue Code, the Division Bench has held that the words "so used" in Sec.66, do not import user by any particular class of persons such as those mentioned in Sec.65 and an occupant of agricultural land is liable to fine under Sec.66 of the Act, if there is any use of his land for non agricultural purpose, irrespective of whether the conversion has been made by the occupant or his tenants or agents or by some trespasser without the occupant's knowledge or consent.

8. A special Full Bench of this Court in State of Gujarat vs. Gordhandas Keshavji Gandhi, III GLR 269 has considered the question regarding binding nature of judicial precedents and observed as under:

> "Judicial precedents are divisiable into two classes, those which are authoritative and those which are persuasive. An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding upon them. A persuasive precedent is one which the Judges are under no obligation to follow, but which they

will take into consideration and to which they will attach such weight as they consider proper. A persuasive precedent depends for its influence upon its own merits.....A decsion of a High Court Judge of a State is regarded as binding on all the subordinate courts in that State. A decision of a Divison Bench of a High Court is regarded as binding on Judges of the same High Court sitting Singly in the High Court. A decisionof a Full Bench i.e. a Bench of atleast 3 Judges of a High Court is considered binding on all Division Benches of the same High Court....A decisoin of a High Court sitting singly is not legally binding on another Judge of the same High Court sitting singly. So also a decision of a Division Bench of a High Court is not legally binding on another Division Bench of the same High Court. A decision of a Full Bench is not legally binding on another Full Bench of the same Court. One Judge of a High Court has however no right to overrule the decision of another Judge of the same High Court, nor has one Division Bench of the same High Court.....The rule that a Court should follow the decision of another Court of co-ordinate jurisdiction is subject however to several exceptions which have been dealt with in Salmond's jurisprudence, 11th Edn. at page 199 to 217.

(1) A decision ceases to be binding if a statute or statutory rule inconsistent with it is subsequently enacted, or if it is reversed or overruled by a higher Court.

(2) A precedent is not binding if it was rendered in ignorance of a statute or a rule having the force of statute.

(3) A precedent loses its binding force if Court that decided it overlooked an inconsistent decision of higher Court.

(4) ......

(5) Precedents sub silentio are not regarded as authoritative. A decision passed sub silentio when the particular point of law involved in the decision is not perceived by the Court or present to its mind"

From the principles enunciated by the Special Full Bench in the above referred to case, there is no manner of

doubt that the judgment rendered by the Division Bench of [Bombay High Court was binding on the learned Single Judge but, the learned Single Judge, delivered the judgment in ignorance of the law laid down by the Division Bench. The consequence is that, the decision rendered by the learned Single Judge is per incuriam and loses its importance as a binding authority. The Latin expression "per incuriam" means through inadvertence. A decision can be,generally, said to be given per incuriam when the High Court has acted in ignorance of a previous binding decision of its own or when the High Court has acted in ignorance of a decision of the Supreme Court. "Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some steps in the reasoning on which it is based, is found, on that account to be demonstrably wrong. If a decision has been given per incuriam, the Court can ignore it. The circumstance that a decision is reached per incuriam merely serves to denude the decision of its precedent value. Such a decision would not be binding as a judicial precednet. A co-ordinate Bench can disagree with it and decline to follow it. A larger Bench can overrule such a decision. In view of the binding decision of the Division Bench of Bombay High Court rendered in the case of Secretary of State (Supra), we are of the opinion that the judgment delivered by the learned Single Judge in the case of Vasudev S. Modi (Supra) is a judgment per incuriam and does not lay down the correct position of law and we overrule the same. Having regard to the language of Sec.66 and the interpretation put by the Division Bench of the Bombay High Court on Sec.66 of the Bombay Land Revenu Code, we are of the opinion that the petitioners, as occupants of agricultural land, are liable to pay fine under Sec.66 of the Code as there was/is user of their land for non agricultural purpose by respondens no.4 to 8 who are agents of the petitioenrs or who are claiming through the petitioners. The submission that the petitioners, as occupants, are not liable to pay fine, therefore, cannot be accepted and is rejected.)

9. It was next contended that respondents nos.4 to 10, had used only 2672 sq. mtrs. of land out of survey no.158/1 totally admeasuring 5632 sq. mtrs. and therefore, the petitioners could not have been saddled with the liability to pay the new assessment leviable under Sec.48 and conversion tax leviable under Sec.67A as well as fine for the whole of survey no.158/1 which admeasures 5362 sq. mtrs. In our view, this contention

is devoid of merits and deserves to be rejected outright. From the order passed by the District Collector, which is produced at Annexure B to the petition, it is evident that statement of a partner of Gokulnagar Organiser was recorded by the Circle Inspector which indicated that the construction made on the land was more than 40% which was permissible under the Rules. Therefore, we are of the opinion that the competent authority was justified in asking the petitioners as well as respondents no.4 to 10 to pay the new assessment leviable under Se.48 as well as the conversion tax and penalty for the whole piece of land admeasuring 5362 sq. mtrs.

10. It was, lastly, claimed that an error apparent on the face of the record has been committed in calculating the new assessment leviable under Sec.48 and therefore, the said error should be corrected by the Court. It was pleaded that, in view of the provisions of Sec.66 of the Bombay Land Revenue Code, 1879, read with Rule 81 of the Gujarat Land Revenue Rules 1972, the new assessment ought to have been levied at the rate of 6 paise per sq. mtr. per annum which would come to Rs.321.80 for land admeasuring 5362 sq. mtrs. and as the land was used for non agricultural purpose for a period of 7 years, before the date of passing of the order, the new assessment could not have been fixed more than Rs.5150/-. We have heard the learned Asst. Govt.Pleader Mr.U.A.Trivedi, on the point. Ordinary rates of non agricultural assessment, have been mentioned in Rule 81 of the Gujarat Land Revenue Rules 1972. Rule 81 inter alia provides that, for the purpose of determining the rate of non agricultural assessment leviable, the Collector has to divide villages, towns and cities into certain classes and it further provides that cities and towns with a population of more than 10,000 and upto 15,000 have to be classfied as class C and the rate per sq. mtr. per annum in paise on lands situated in cities and towns falling within class C is 6 paise pere sq. mtr. per annum if the land is used for residential purpose. Under the circumstnaces, the new assessment leviable would be Rs.321.80 ps. for 5362 sq. mtrs. of land and as the land was put to non agricultural use for a period of 7 years, the new assessment would work out to Rs.5150/-. The Deputy Collector, Ahmedabad, i.e. respondent no.3, has committed an obvious error apparent on the face of the record in calculating the new assessment leviable under Sec.48 of the Code and therefore, we hold that the petitioners as well as respondents no.4 to 10 are liable to pay a sum of Rs.5150/- as new assessement instead of Rs.25,744/determined in order dated August 2, 1991, which is passed by respondent no.3. We make it clear that as

provided in the order dated August 2, 1991, the competent authority will be entitled to charge amount of local fund as well as education cess from the petitioners as well as respondents 4 to 10 together with new assessment of Rs. 5150/-, conversion tax of Rs.5362/- as well as penalty of Rs.12,872/-. The direction given by respondent no.3 to remove the unauthorised construction within 3 months is hereby upheld and is not interfered with at all.

11. For the foregoing reasons, the petition partly succeeds. It is directed that respondent n.3 would be entitled to collect an amount of Rs.5150/- from the petitoners as well as respondents no.4 to 10 by way of new assessment, over and above the amount of local fund, education cess, conversion tax and fine. Rule is made absolute to the extent indicated hereinabove with no order as to costs. Ad-interim relief granted earlier is hereby vacated.

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